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No. 00-606

In The

Supreme Court of the United States

SUMMIT PROPERTIES, INC., *et al.*,

Petitioners,

v.

HOECHST-CELANESE CORP., formerly known as CELANESE CORP., *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether a Civil RICO plaintiff must plead and prove that he or she received, and detrimentally relied upon, the alleged mail or wire fraud in order to establish proximate causation between the violation and injury?

CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

Household International, Inc. ("Household International") is a holding company whose stock is publicly traded on the New York Stock Exchange. There is no parent or publicly held company owning ten percent (10%) or more of Household International's stock.

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STATUTORY PROVISIONS

18 U.S.C. § 1341, in relevant part, provides:

> Whoever, having devised . . . any scheme . . . to defraud . . . **for obtaining money or property** . . . by means of false or fraudulent pretenses, representations, or promises . . . places in any post office . . . any matter . . . to be sent or delivered by the Postal Service . . . shall be fined . . . or imprisoned . . . (emphasis added).

18 U.S. C. § 1343, in relevant part, provides:

> Whoever, having devised . . . any scheme . . . to defraud . . . **for obtaining money or property** . . . by means of false or fraudulent pretenses, representations, or promises, transmits . . . by means of wire . . . communication in interstate or foreign commerce, any . . . signals . . . for the purpose of executing such scheme . . . shall be fined . . . or imprisoned . . . (emphasis added).

STATEMENT OF THE CASE

Petitioners' Statement of the Case contains several inaccuracies, most notably, the Petitioners have misstated the Question which should be reviewed. [Petition at 2]. Petitioners seek review of an order issued by the District Court for the Southern District of Texas, Houston Division, in which the trial court held that:

> The Court concludes, based on its review of the civil RICO statute and the cases cited herein, that absent an allegation that Defendants made material misrepresentations to Plaintiffs and

> that Plaintiffs relied on the mail and wire fraud on which the Civil RICO claims are predicated, Plaintiffs cannot satisfy the proximate causation requirements for purposes of Civil RICO. As a result, Plaintiffs [sic] Civil RICO claim must be dismissed.

[Petitioners' Appendix at 25a]. Therefore, the correct Question to be reviewed is "Whether a Civil RICO plaintiff must plead and prove that he or she received, and detrimentally relied upon, the alleged mail or wire fraud in order to establish proximate causation between the alleged violation and injury?"

The Petitioners also misstate the holdings of the various circuit courts on whether a Civil RICO plaintiff, in a claim based upon the predicate acts of mail and/or wire fraud, must plead and prove that they detrimentally relied upon the alleged fraudulent communications. [Petition at 3]. Contrary to Petitioners' assertions, the Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth and Eleventh Circuits clearly say "yes."[1]

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[1] *Metromedia Co. v. Fugazy*, 983 F.2d 350, 368 (2nd Cir. 1992); *Ideal Dairy Farms, Inc. v. John Labatt, Ltd.*, 90 F.3d 737, 746-47 (3rd Cir. 1996); *Chisolm v. TranSouth Fin. Corp.*, 95 F.3d 331, 337 (4th Cir. 1996); *Summit Properties, Inc. v. Hoechst Celanese Corp.*, 214 F.3d 556, 562 (5th Cir. 2000) and *Heden v. Hill*, 937 F. Supp. 1230, 1243 (S.D. Tex. 1996); *Central Distributors of Beer, Inc. v. Conn*, 5 F.3d 181, 184 (6th Cir. 1993); *Reynolds v. East Dyer Dev. Co.*, 882 F.3d 1249, 1253 (7th Cir. 1989); *Appletree Square I Ltd. Partnership v. W. R. Grace & Co.*, 29 F.3d 1283, 1286 (8th Cir. 1994); *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1481 (9th Cir. 1997); *Bacchus Indus., Inc. v. Arvin Indus., Inc.*, 939 F.2d 887, 892 (10th Cir. 1991); *All Care Nursing Service, Inc. v. High Tech Staffing, Inc.*, 135 F.3d 740, 745 n.10 (11th Cir. 1998) and *Pelletier v. Zweifel*, 921 F.2d 1465, 1499-1500 (11th Cir. 1991).

Accordingly, ***because there is no conflict among the circuits,*** Petitioners' statement that this Petition presents the Court with an apt vehicle to settle the conflict among the circuits is false. *Id.*

Additionally, Petitioners' "apt vehicle" assertion is false because, regardless of the outcome of this Petition: (A) these Petitioners cannot assert a valid RICO claim based on this Court's recent ruling in *Cleveland v. United States*, ___ U.S. ___, 121 S.Ct. 365, 69 USLW 4003 (2000), (B) the underlying dismissal order could be affirmed on alternative grounds, and (C) there is no adequate factual record upon which this Court could conduct its review.

Finally, Petitioners are incorrect when they state that the **Respondents** are manufacturers that marketed PB pipes and acetal fittings. [Petition at 3]. **Respondent** Household International has never designed, manufactured, or marketed any plumbing system. [Household International Appendix at App. 15]. Furthermore, Household International has never provided any raw material used in any plumbing system. *Id.* Household International's only alleged connection to this lawsuit stems from its former ownership of a subsidiary company, Household Manufacturing, Inc.,[2] which in turn owned United States Brass Corporation, a company that did design, manufacturer and market PB pipes and acetal

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[2] Long after United States Brass Corporation began designing, manufacturing and/or marketing polybutylene plumbing systems (mid to late 1970's), Household International owned Household Manufacturing, Inc. (later known as Eljer Manufacturing, Inc.) for a brief period of time (February 20, 1981 to April 14, 1989).

fittings. *Id.* Consequently, because **Respondent** Household International did not design, manufacturer or market PB pipe and acetal fittings, Petitioners also make misstatements when they state that:

> Shell orchestrated a complex "scheme to defraud" between itself and the other **Respondents** designed to convince the construction industry and – significantly, its standard-setting bodies – that the use of PB pipes and acetal fittings in plumbing systems would be suitable for those systems and that they were superior to, and less expensive than, copper pipes, the use of which then dominated the market. (App. 55a) The scheme was a fraud on the market. (App. 55a) **Respondents** marketed PB pipes and acetal fittings across the country to code bodies, builders, developers, plumbing distributors, and other users of plumbing parts. (App. 52a, 57a-58a) Their [**the Respondents'**] objective was to create an enormous demand for PB pipe and acetal fittings by making them "the material of choice" instead of copper for residential and commercial plumbing systems. (App. 57a). Among other things, the **Respondents** represented that PB pipes and acetal fittings: (1) were suitable for use in a potable water plumbing system; (2) would last at least 50 years; (3) would not corrode and even the most aggressive water would not attack it; (4) was easy, reliable, simple, proven and fast to install; and (5) would not occasion serious service problems. (App. 59a-60a). In fact, scientists within the companies of the **Respondents** specifically advised their superiors that the PB and acetal resins were not suitable for water systems because they would degrade when exposed to chlorinated water.

> (App. 61a) Hope for increased profits by the marketing arms of the **Respondents** prevailed over these scientific objections. (*Id.*)

(emphasis added) [Petition at 4-5].

REASONS FOR DENYING THE WRIT

I. THERE IS NO CONFLICT AMONG THE CIRCUITS

Notwithstanding Petitioners' arguments [Petition at 6-17], the Fifth Circuit's opinion does not conflict with any decision of this Court or of any other circuit on the same matter. To the contrary, every circuit court to have recently addressed the issue has held that detrimental reliance by the plaintiff is required to show proximate cause in Civil RICO actions involving mail or wire fraud.

A. The Second Circuit Requires Reliance

In *Metromedia Co. v. Fugazy*, the Second Circuit reiterated its requirement that "[i]n the context of an alleged RICO predicate act of mail fraud . . . the plaintiff [i]s required to demonstrate that the defendant's misrepresentations were relied upon." 983 F.2d 350, 368 (2nd Cir. 1992).[3] Attempting to avoid the clear holding of *Metromedia*, Petitioners argue that the decision in *County of*

[3] Petitioners attempt to limit the import of *Metromedia* by arguing that its application is limited to "simple, two-party misrepresentation cases." [Petition at 13]. Petitioners offer no support for this proposition, and none exists, as the *Metromedia* court did not qualify or limit its holding in any such manner. *See* 983 F.2d at 368.

Suffolk v. Long Island Co., 907 F.2d 1295 (2nd Cir. 1990), holds that such reliance by *third parties*, instead of plaintiffs, is sufficient under Civil RICO. However, *Suffolk* was decided before this Court's holding in *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992), and Petitioners' reliance on *Suffolk* is mistaken.

In *Suffolk*, ratepayers claimed that a group of utility defendants allegedly defrauded the New York State Public Service Commission ("PSC") into approving higher rates to consumers for its services. *See* 907 F.2d at 1299-1300. The Second Circuit affirmed the trial court's dismissal of plaintiffs' Civil RICO claims. *Id.* at 1312. In so ruling, the Second Circuit recognized that plaintiffs could not show reliance even by the PSC. Thus, the court had no reason to address the issue of reliance by the ratepayers. *See id.* at 1311-12. This ruling is precisely what *Holmes* requires.[4]

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[4] Petitioners also cite *Cement and Concrete Workers Dist. Council v. Lollo*, 148 F.3d 194 (2nd Cir. 1988) and *Standardbred Owners Ass'n v. Roosevelt Raceway*, 985 F.2d 102 (2nd Cir. 1993), as purported support for their alleged circuit conflict. [Petition at 13-14]. Neither case supports Petitioners' arguments. *Lollo* did not involve Civil RICO. *Standardbred Owners Ass'n* involved misrepresentations that plaintiffs received and relied upon. *See* 985 F.2d at 103. This holding is in complete harmony with the dictates of *Holmes*. Indeed, the Second Circuit recently acknowledged that *Standardbred Owners Ass'n* was based on plaintiffs' direct reliance on defendants' allegedly fraudulent statements. *See Laborers Local 17 v. Phillip Morris, Inc.*, 191 F.3d 229, 237-38 (2nd Cir. 1999).

B. The Third Circuit Requires Reliance

The Third Circuit likewise requires detrimental reliance in Civil RICO actions predicated on mail or wire fraud. In *Ideal Dairy Farms, Inc. v. John Labatt, Ltd.*, 90 F.3d 737 (3rd Cir. 1996), plaintiff sued several processed milk suppliers, alleging that they engaged in a scheme to overcharge plaintiff for dairy products in violation of Civil RICO based on mail and wire fraud. *Id.* at 741. Because, as in this case, plaintiff was unable to plead and prove that it detrimentally relied upon any of the alleged instances of mail and wire fraud, the district court dismissed the RICO claims. *Id.* On appeal, the Third Circuit held that plaintiff's failure to plead and prove detrimental reliance warranted dismissal of its RICO claims, and affirmed the decision of the district court. *Id.*[5]

In an attempt to avoid the holding in *Ideal*, Petitioners cite the pre-*Holmes* RICO decision in *Environmental Tectonics v. W.S. Kirkpatrick & Co., Inc.*, 847 F.2d 1052 (3rd Cir. 1988). *Environmental Tectonics*, however, has no application to this case, as it was a commercial bribery action. Given that bribery claims do not require reliance, the case unsurprisingly does not mention, much less consider, whether "reliance" is an aspect of proximate cause under Civil RICO. *See id.*

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[5] Attempting to blur the clear "reliance" holding of *Ideal*, Petitioners erroneously contend that its application is somehow limited to "two-party representation case[s]." [Petition at 9]. This contention is completely unsupportable, however, as the *Ideal* court made no such distinction and did not in any way limit its holding. *See* 90 F.3d at 737.

C. The Fourth Circuit Requires Reliance

Contrary to Petitioners' claim, the Fourth Circuit clearly holds that detrimental reliance is required to show proximate cause in a Civil RICO claim based on mail and wire fraud. For example, in *Brandenburg v. Seidel*, 859 F.2d 1179, 1188-90 (4th Cir. 1988), the court held that Civil RICO plaintiffs who base their claims on predicate acts of mail or wire fraud must allege both that they detrimentally relied on the fraudulent statements and that the fraudulent statements were the proximate cause of the alleged injury to their property or business. In cases decided since *Brandenburg*, the Fourth Circuit has uniformly required a showing of detrimental reliance in Civil RICO actions predicated on mail or wire fraud. *See Chisolm v. TranSouth Fin. Corp.*, 95 F.3d 331, 338-39 (4th Cir. 1996) (remanding to allow the plaintiffs to replead because they did not plead detrimental reliance); *Mid-Atlantic Telecom, Inc. v. Long Distance Servs., Inc.*, 18 F.3d 260, 264 (4th Cir. 1994) (remanding for, among other things, resolution of reliance issue); *Caviness v. Derand Res. Corp.*, 983 F.2d 1295 (4th Cir. 1993) (noting that a showing of reliance on the predicate act of fraud ensures the existence of a "direct relation between the injury asserted and the injurious conduct alleged."); *Lifschultz Fast Freight, Inc. v. Consolidated Freightways Corp.*, 805 F. Supp. 1277, 1291-92 (D.S.C.), *aff'd*, 998 F.2d 1009 (4th Cir. 1992) (proximate cause not established where "alleged predicate acts were all directed at third parties").

Notwithstanding the Fourth Circuit's clear and consistent mandates regarding reliance, Petitioners attempt to manufacture a conflict by contending erroneously that

Chisolm is in "flat contradiction" with *Summit*. [Petition at 15]. Petitioners are mistaken. Indeed, the Fourth Circuit's ruling on this point could not have been more clear, as the court expressly stated that "where fraud is alleged as a proximate cause of the injury, the fraud must be a 'classic' one. In other words, the plaintiff must have justifiably relied, to his detriment, on [the fraud]." *See Chisolm*, 95 F.3d at 337.

In *Chisolm*, plaintiffs alleged that defendants sent fraudulent documents through the mail, but failed to allege that they relied upon them to their detriment. *Id.* at 333. As such, the district court dismissed plaintiffs' RICO claims for failure to plead detrimental reliance. *Id.* On appeal, the Fourth Circuit reiterated its long-standing requirement that Civil RICO plaintiffs plead and prove detrimental reliance, stating:

> where the predicate act giving rise to civil liability under RICO was alleged to have been mail fraud, prospective plaintiffs must, in order to demonstrate standing to sue, plausibly allege both that they detrimentally relied in some way on the fraudulent mailing, [citations omitted] and that the mailing was a proximate cause of the alleged injury to their business or property.

Id. at 337. The court remanded the case with the instruction that the plaintiffs be given an opportunity to cure their reliance pleading "defect." *Id.* at 339. Upon remand, the plaintiffs amended their complaint and specifically pled detrimental reliance upon TranSouth's acts of mail fraud. *Chisolm v. TranSouth Fin. Corp.*, No. 97-1970, 1998 WL 709311, at *2 (4th Cir. Oct. 5, 1998) (unreported).

In short, *Chisolm* is entirely consistent with the instant action. Both cases held that pleading and proof of reliance were a necessary prerequisite to a claim under Civil RICO based on mail or wire fraud. The only difference is that in *Chisolm*, unlike here, plaintiffs alleged receipt and detrimental reliance upon the acts of mail fraud. *See Chisolm*, 95 F.3d at 334; *Chisolm*, No. 97-1970, 1998 WL 709311, at *2. In stark contrast, Petitioners here fully concede that they "did not rely on anything [Respondents allegedly] said or published in purchasing their properties." [Petition at 7a].

D. The Sixth Circuit Requires Reliance

As Petitioners concede, the Fifth and Sixth Circuits are consistent in requiring detrimental reliance in Civil RICO actions predicated on mail or wire fraud. [Petition at 24]. The Sixth Circuit's "reliance" requirement is exemplified by *Central Distributors of Beer, Inc. v. Conn*, wherein it affirmed the dismissal of Civil RICO claims based on mail and wire fraud because the plaintiff was unable to present evidence that it received and relied upon any misrepresentations or omissions of material facts from the defendants. *See* 5 F.3d 181, 184 (6th Cir. 1993) ("the defendant must make a false statement or omission of fact to the plaintiff to support a claim of wire fraud or mail fraud as a predicate act for a RICO claim."); *see also Kenty v. Bank One*, 92 F.3d 384, 390-91 (6th Cir. 1996) (affirming dismissal of Civil RICO claims based on mail fraud because plaintiffs were unable to state with particularity a misrepresentation made to them by the defendants).

E. The Seventh Circuit Requires Reliance

Petitioners also concede that the Fifth and Seventh Circuits are consistent in requiring detrimental reliance on alleged misrepresentations made the basis of a Civil RICO claim. [Petition at 23]. The Seventh Circuit's rulings on this issue are set forth clearly in *Reynolds v. East Dyer Development Company*, where it affirmed the dismissal of Civil RICO claims predicated on mail or wire fraud because plaintiffs were unable to demonstrate that they received and relied upon any alleged misrepresentations or omissions by the defendants. 882 F.2d 1249, 1254 (7th Cir. 1989).

F. The Eighth Circuit Requires Reliance

In *Appletree Square I, Ltd. Partnership v. W.R. Grace & Co.*, 29 F.3d 1283 (8th Cir. 1994), the Eighth Circuit confirmed that, to satisfy proximate cause, Civil RICO plaintiffs must plead and prove reliance upon the alleged predicate acts of mail or wire fraud. *See* 29 F.3d at 1286. The facts of *Appletree* are strikingly similar to the instant case, as *Appletree* also involved an unsuccessful attempt to transform a garden variety products liability claim into a Civil RICO action. *See id.* at 1284. There, plaintiff, an owner of an office building, instituted a Civil RICO action against a remote supplier of an asbestos fireproofing product, but never contended that it relied on any misstatements or misrepresentations of the defendants in

purchasing the building. *Id.*[6] The Eighth Circuit affirmed dismissal of the case, holding:

> Because Appletree has not produced any evidence to show it detrimentally relied on any of the alleged misrepresentations in its purchase of the building, it has failed to establish the existence of a genuine issue of material fact as to whether the alleged misrepresentations proximately caused its claimed injuries *and thus lacks standing to bring its civil RICO claims.*

29 F.3d at 1287 (emphasis added).

Petitioners label *Appletree* as an "anomaly," and proceed to discuss three other decisions which they contend are "more typical" examples of Eighth Circuit law on proximate cause under Civil RICO. [Petition at 10]. As shown below, however, none of those decisions are inconsistent with either *Appletree* or *Summit*.

Petitioners first rely upon *Atlas Pile Driving Co. v. DiCon Financial Co.*, a pre-*Holmes* decision which did not even address proximate causation under Civil RICO, but rather focuses on the statutory requirements for mail and wire fraud. 886 F.2d 986, 990-93 (8th Cir. 1989). Petitioners also rely upon *Bieter Co. v. Blomquist*, 987 F.2d 1319 (8th Cir. 1993); however, that case involved a bribery claim

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[6] Instead, the owner attempted (as do Petitioners in this case) to establish detrimental reliance through a "fraud-on-the-market" theory. *See id.* at 1286. The court rejected this contention, properly noting that the "fraud-on-the-market" theory of reliance has been reserved almost exclusively for securities fraud cases. *Id.*; *see also Summit*, 214 F.2d at 561 ("There is no pretense of such a market here and the fraud on the market doctrine is not applicable.").

and thus neither mentioned nor considered whether detrimental reliance upon predicate acts of mail or wire fraud is necessary to state a Civil RICO claim.

Petitioners' citation to *United HealthCare Corporation v. American Trade Insurance Co.*, 88 F.3d 563 (8th Cir. 1996), is similarly unavailing. *United HealthCare* did not address the question of whether detrimental reliance was required to prove proximate causation, instead it addressed the question of whether detrimental reliance was required to prove a violation of the mail or wire fraud statutes. Before holding that detrimental reliance was required to prove proximate causation, the *Summit* court addressed the same question as *United HealthCare*, and it stated:

> The question before us is whether a plaintiff's reliance on the predicate mail or wire fraud is necessary in order to establish proximate causation. In *Armco Industries Credit Corp. v. SLT Warehouse Co.*, this court distinguished mail fraud under RICO from common law fraud and stated that 'to find a *violation* of the federal mail fraud statute it is not necessary that the victim have detrimentally relied on the mailed misrepresentations.' Ours is a different question.

(emphasis in original) [Petition at 4a]. Consequently, the Petitioners' reliance on *United HealthCare* is misplaced.

G. The Ninth Circuit Requires Reliance

Although not addressed by Petitioners, the Ninth Circuit also requires reliance on alleged misrepresentations in Civil RICO cases based on mail and wire fraud. For example, in *Forsyth v. Humana, Inc.*, the Ninth Circuit

affirmed the dismissal of a Civil RICO action predicated on mail and wire fraud where plaintiffs were unable to establish that they relied on any specific misrepresentations regarding the calculation of insurance premiums by the defendants. *See* 114 F.3d 1467, 1481 (9th Cir. 1997); *see also MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504-05 (9th Cir. 1986) (holding that plaintiff's mail fraud and racketeering charges were "without foundation" because it could not state reliance).

H. The Tenth Circuit Requires Reliance

The Tenth Circuit, consistent with the instant case, also requires plaintiffs to plead detrimental reliance in order to state a Civil RICO claim based on mail and wire fraud, and Petitioners do not contend otherwise. Application of the Tenth Circuit's rule is found in *Bacchus Indus., Inc. v. Arvin Indus., Inc.*, where the court held that plaintiff could not state a Civil RICO claim based on mail and wire fraud because it failed to plead detrimental reliance on any fraudulent misrepresentations. *See* 939 F.2d 887, 892 (10th Cir. 1991).

I. The Eleventh Circuit Requires Reliance

The Eleventh and Fifth Circuits are uniform with respect to their treatment of "proximate cause" in Civil RICO cases involving mail or wire fraud. For example, in *Pelletier v. Zweifel*, the Eleventh Circuit held that "when the alleged predicate act is mail or wire fraud, the plaintiff must have been a target of the scheme to defraud and must have relied to his detriment on misrepresentations

made in furtherance of that scheme." 921 F.2d 1465, 1499-1500 (11th Cir. 1991).

Since *Pelletier*, the Eleventh Circuit has consistently required such direct reliance, and also squarely held that alleged instances of mail and wire fraud directed to *third parties* are insufficient to satisfy RICO proximate cause. *See All Care Nursing Serv., Inc. v. High Tech Staffing Servs., Inc.*, 135 F.3d 740, 745 n.10 (11th Cir. 1998), *cert. denied*, 526 U.S. 1019 (1999) ("[r]eliance is only an element of a RICO claim to the extent that a RICO plaintiff must prove he was injured by the RICO defendant's deception and fraud."); *Johnson Enters. of Jacksonville, Inc. v. FPL Group, Inc.*, 162 F.3d 1290, 1318 (11th Cir. 1998) ("Because the misrepresentations the defendants are said to have made were directed to [third parties], not [the plaintiff], [plaintiff] lacks standing under section 1964(c) to prosecute a claim based on such misrepresentations.").[7]

The three cases cited by Petitioners do not create a conflict between *Pelletier* and its progeny. First, *Taffet v. Southern Co.*, which was decided before *Holmes*, has nothing to do with the issue in this case. That case involved ratepayers' claims that the defendants defrauded public utility commissions into approving elevated utility rates,

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[7] Petitioners try to circumvent the clear dictates of *Pelletier* by attempting to limit its holding to "simple, two-party misrepresentation cases." [Petition at 12]. However, Petitioners fail to cite the Court to any part of *Pelletier* imposing (or even mentioning) such a limitation, and the court did not limit or qualify its holding in any such manner. *See* 921 F.2d at 1499-1500. Additionally, as evidenced by the *Pelletier* court's 59 page decision, it was anything but a "simple, two-party misrepresentation" case. *See* 921 F.2d 1465.

which were then passed on to consumers. See 930 F.2d 847, 856 (11th Cir. 1991). Petitioners strangely fail to refer to the Eleventh Circuit's *en banc* decision in *Taffet*, 967 F.2d 1483 (11th Cir. 1992), but rather cite to an earlier, vacated decision of a three judge panel. [Petition at 11-12]. As the *en banc* decision made clear, *Taffet* did not address the proximate cause and reliance issues in this case. *See* 967 F.2d at 1494. Rather, on reconsideration, the Eleventh Circuit, reversing its earlier decision, held that the plaintiffs failed to allege a cognizable injury under Civil RICO due to application of the "filed rate doctrine." *See id.*

Petitioners also rely on *Cox v. Administrator U.S. Steel & Carnegie*, 17 F.3d 1386 (11th Cir. 1994), but that case involved a bribery claim, did not involve mail or wire fraud, and thus the court obviously did not consider "reliance" as an aspect of Civil RICO proximate cause. *See* 17 F.3d at 1398-1403. *Cox* did, however, cite approvingly to both *Pelletier* and *Brandenburg*, which, as discussed above, both hold that detrimental reliance is required in Civil RICO actions involving mail or wire fraud. *See* 17 F.3d at 1396, 1399. Petitioners additionally claim that the instant case conflicts with *All Care Nursing Serv., Inc.*, but that case reaffirmed the reliance holding set forth in *Pelletier*. *See* 135 F.3d at 745 n.10.

J. There Is No Conflict With The District of Columbia Circuit

Petitioners essentially concede that the District of Columbia Circuit has not yet decided the issue as to whether detrimental reliance upon predicate acts of mail

or wire fraud is necessary in Civil RICO cases. Nevertheless, Petitioners attempt to manufacture a conflict between the Fifth and District of Columbia Circuits by relying on *BCCI Holdings (Luxembourg), S.A. v. Khalil*, 214 F.3d 168 (D.C. Cir. 2000), which involved a scheme by several defendants to misappropriate almost four hundred million dollars from an international bank. 214 F.3d at 169-70. Petitioners' reliance on *BCCI* is misplaced, as that case did not involve detrimental reliance under Civil RICO in cases involving mail and wire fraud. *See id.* at 173-74.

II. THIS PETITION DOES NOT PRESENT AN "APT VEHICLE" FOR THIS COURT TO RESOLVE THE CONFLICT AMONG THE CIRCUITS

Petitioners assert that this Petition presents an apt vehicle for this Court to resolve the conflict among the circuits. Assuming *arguendo*, that a conflict does exist among the circuits, this Petition does not present an "apt vehicle" for this Court to resolve that conflict because, regardless of the outcome of this Petition: (A) the Petitioners, based on *Cleveland*, cannot state a valid Civil RICO claim, (B) the underlying dismissal order can be affirmed on other grounds, and (C) there is no adequate factual record upon which this Court could conduct its review.

A. Based on this Court's Recent Holding in *Cleveland*, the Petitioners Cannot State a Valid Civil RICO Claim

In *Cleveland*, Carl W. Cleveland assisted Fred Goodson in preparing a license application, as well as three renewal applications, for Truck Stop Gaming, Ltd. ("TSG") to operate video poker machines. (___ U.S. ___, 121 S.Ct., at 369) On each application, Messrs. Cleveland and Goodson named Mr. Goodson's adult children, Alex and Maria Goodson, as TSG's owners. *Id.* However, Messrs. Cleveland and Goodson were the true owners, but they could not identify themselves as the true owners because they had tax and financial problems which would render them "unsuitable" to receive a gaming license. *Id.* Therefore, without question, between 1992 and 1995, Messrs. Cleveland and Goodson mailed fraudulent applications to the State licensing agency. In 1996, Messrs. Cleveland and Goodson were charged with money laundering, racketeering and conspiracy. *Id.* Among the "predicate acts" allegedly supporting these charges were four counts of violating the federal mail fraud statute. *Id.*

Before trial, Mr. Cleveland filed a motion to dismiss based on the ground that the alleged fraud did not deprive the State of "property" under the federal mail fraud statute. *Id.* The District Court denied Mr. Cleveland's motion to dismiss, after which the jury convicted Mr. Cleveland on two counts of mail fraud, and on money laundering, racketeering, and conspiracy counts predicated on mail fraud. *Id.* The convictions were affirmed by

the Fifth Circuit Court of Appeals, *United States v. Bankston*, 182 F.3d 296, 309 (5th Cir. 1999), but were reversed by this Court. (___ U.S. ___, 121 S.Ct., at 370)

In reversing the convictions, this Court held that misrepresentations or omissions made to governmental bodies to obtain a license are not actionable under the federal mail fraud statute.

> This case presents the question of whether the federal mail fraud statute, 18 U.S.C. § 1341 reaches false statements made in application for a state license. . . . We conclude that ***permits of licenses of this order do not qualify as 'property' within 1341's compass***. It does not suffice, we clarify, that the object of the fraud may become property in the recipient's hands; for purposes of the mail fraud statute, ***the thing obtained must be property in the hands of the victim***.

(___ U.S. ___, 121 S.Ct., at 368) (emphasis added). Moreover, because there was no mail fraud, this Court held that the convictions based on the alleged "predicate acts" of mail fraud, *i.e.* racketeering, had to be reversed. (___ U.S. ___, 121 S.Ct., at 374-75)

The same situation is present here. The Petitioners' RICO claims are based on the predicate acts of mail and wire fraud. The alleged fraudulent communications, however, were made to governmental licensing bodies, i.e. the plumbing code bodies, for the purpose of obtaining a permit/license to use PB in a given locale. Therefore, the alleged fraudulent communications were not made to obtain "property" as required by the mail or wire fraud statutes. Moreover, because these Petitioners claim they

are the "victim," the allegedly fraudulent communications were not made to obtain "property in the hands of the victim."

Accordingly, under *Cleveland*, the fraudulent communications alleged by the Petitioners cannot be violations of the mail or wire fraud statutes. Since these allegedly fraudulent communications are not violations of the mail or wire fraud statutes, they cannot be used as "predicate acts" upon which to base a Civil RICO claim. Accordingly, based on this Court's recent decision in *Cleveland*, these Petitioners cannot assert a valid Civil RICO claim regardless of the outcome of this Petition.

B. The Underlying Dismissal Order Could Be Affirmed on Other Grounds

Regardless of the outcome of this Petition, the underlying dismissal order could be affirmed on any ground properly raised and presented in the trial court. *Esteves v. Brock*, 106 F.3d 674, 675 (5th Cir.), *cert. denied*, 522 U.S. 828 (1997). In the trial court, Household International asserted that Petitioners' Civil RICO claims should be dismissed because the Petitioners: (1) failed to state their claims with the specificity and particularity required, and (2) failed to allege that Household International committed any RICO violation, and therefore, the Petitioners had not, and could not, allege that their injuries were caused by Household International. [Household International Appendix at App. 36-43]. Accordingly, because the Petitioners have failed to state a valid Civil RICO claim, this Petition does not present an apt vehicle for this Court to resolve the alleged conflict among the circuits.

C. There Is No Adequate Factual Record Upon Which This Court Could Conduct its Review

Review pursuant to 28 U.S.C. § 1254 is discretionary. Consequently, this Court should choose the "best vehicle" when granting a Writ of Certiorari. To be the best vehicle, the Petition would have to be based on a contested factual record, one which had winnowed the facts from the bald assertions, only then could this Court conduct a full and fair review. This Petition is not based on an adequate factual record, instead this Petition is based solely on the Complaint and RICO Case Statement. Accordingly, this Petition is not the best vehicle, and in fact is not even an apt vehicle, for this Court to use in resolving the alleged conflict among the circuits.

CONCLUSION

Petitioners seek a Writ of Certiorari based on an alleged conflict among the circuits. However, every circuit court which has addressed the question of "Whether a Civil RICO plaintiff must plead and prove that he or she received, and detrimentally relied upon, the alleged mail or wire fraud in order to establish proximate causation between the alleged violation and injury?," has answered the question "YES." Accordingly, there is no conflict among the circuits and the Petition should be denied.

Moreover, even if there were a conflict among the circuits, the Petition should still be denied because: (A) per *Cleveland*, the Petitioners cannot state a valid Civil RICO claim, (B) the underlying dismissal order could be

affirmed on alternative grounds, and (C) there is no adequate factual record upon which this Court could conduct its review.

For these reasons, Respondent Household International, Inc. requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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App. 1

CASE NO. 99-20622

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

SUMMIT PROPERTIES, INC.; SUMMIT PROPERTIES LP; SUMMIT PROPERTIES PARTNERSHIP LP; STONY POINT/SUMMIT LP; McGREGOR/McGUIRE LP; HENDERSON/McGUIRE PARTNERS LP; OAK RIDGE/McGUIRE PARTNERS LP; WAVERLY PLACE/SUMMIT PARTNERS LP,

Plaintiffs/Appellants

v.

HOECHST CELANESE CORPORATION, formerly known as Celanese Corporation; HOECHST CORPORATION; E I DuPONT DE NEMOURS, AND CO.; SHELL OIL COMPANY, d/b/a Shell Chemical Company; VANGUARD PLASTICS, INC.; BOW INDUSTRIAL CORP.; HOUSEHOLD INTERNATIONAL, INC.,

Defendants/Appellees

On Appeal from the United States District Court for the Southern District of Texas-Houston Division
No. H-98-CV-1954

RESPONSE BRIEF OF APPELLEE HOUSEHOLD INTERNATIONAL, INC.

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CERTIFICATE OF INTERESTED PERSONS

Case No. 99-20622
SUMMIT PROPERTIES, INC.; SUMMIT PROPERTIES LP; SUMMIT PROPERTIES PARTNERSHIP LP; STONY POINT/SUMMIT LP; McGREGOR/McGUIRE LP; HENDERSON/McGUIRE PARTNERS LP; OAK RIDGE/McGUIRE PARTNERS LP; WAVERLY PLACE/SUMMIT PARTNERS LP,

Plaintiffs/Appellants

v.

HOECHST CELANESE CORPORATION, formerly known as Celanese Corporation; HOECHST CORPORATION; E I DuPONT DE NEMOURS AND CO.; SHELL OIL COMPANY, d/b/a Shell Chemical Company; VANGUARD PLASTICS, INC.; BOW INDUSTRIAL CORP.; HOUSEHOLD INTERNATIONAL, INC.,

Defendants/Appellees

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Summit Properties, Inc.:
Appellant

Summit Properties Limited Partnership:
Appellant

Summit Properties Partnership Limited Partnership:
Appellant

Stony Point/Summit Limited Partnership:
Appellant

McGregor/McGuire Limited Partnership:
Appellant

Henderson/McGuire Partners Limited Partnership:
Appellant

Oak Ridge/McGuire Partners Limited Partnership:
Appellant

Waverly Place/Summit Partners Limited Partnership:
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REQUEST FOR ORAL ARGUMENT

Household International, Inc. requests oral argument to resolve the issues presented in this case. The issues presented concern whether detrimental reliance is required to prove proximate cause in a civil RICO claim, and whether the District Court properly denied the Property Owners' Motion to Alter or Amend the Judgment and For Reconsideration Under Rule 59(e).

IDENTIFICATION OF PARTIES

Due to the number of Parties presented in this appeal, and for the convenience of the Court in reading the Response Brief, the Parties to this appeal will be identified as follows:

1. Summit Properties, Inc., Summit Properties Limited Partnership, Summit Properties Partnership

Limited Partnership, Stony Point/Summit Limited Partnership, McGregor/McGuire Limited Partnership, Henderson/McGuire Partners Limited Partnership, Oak Ridge/McGuire Partners Limited Partnership, and Waverly Place/Summit Partners Limited Partnership will be referred to collectively as the "Property Owners."

2. Hoechst Celanese Corporation f/k/a Celanese Corporation, Hoechst Corporation, E.I. Du Pont De Nemours & Company, Shell Oil Company d/b/a Shell Chemical Company, Vanguard Plastics, Inc., and Bow Industrial Corporation will be referred to collectively as the "Manufacturers."

3. Household International, Inc. will be referred to as "Household International."

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STATEMENT OF THE ISSUES

I. Did the District Court properly dismiss the Property Owners' civil RICO claims under Rule 12(b)(6) for failure to plead or prove detrimental reliance as proof of proximate cause as required by 18 U.S.C. § 1964(c), because the Property Owners admit that they did not detrimentally rely on the alleged fraudulent statements?

II. Did the District Court properly deny the Property Owners' Motion to Amend or Alter Judgment and For Reconsideration Under Rule 59(e) because the Property Owners failed to present any new or persuasive arguments in support of their motion?

CROSS-POINT

Should the District Court's dismissal be alternatively affirmed because the Property Owners failed to properly plead a RICO claim?

STATEMENT OF THE CASE

Household International agrees with the Property Owners' version of the Statement of the Case except in the following particulars:

1. Household International denies that it engaged in any conduct that (1) caused the Property Owners' alleged damages, (2) violated 18 U.S.C. § 1961 *et seq.* (Civil RICO), or (3) violated state common law.

2. Household International denies that there is any Fifth Circuit case holding that plaintiffs do not have to plead and prove detrimental reliance to establish proximate cause in a civil RICO case premised on allegations of mail and wire fraud.

3. Household International denies that the District Court's July 9, 1999 *Memorandum Opinion and Order* (*"July Reconsideration Order"*) is an Order dismissing the Property Owners' claims, and denies that the *July Reconsideration Order* is based on a finding that the Property Owners' alleged injuries were "indirect" or "too remote" to establish proximate cause. Instead, the District Court's *July Reconsideration Order* is merely an Order denying the Property Owners' Motion to Alter or Amend Judgment and For Reconsideration Under Rule 59(e) because they failed to present new or persuasive arguments in support of their Rule 59(e) motion.

STATEMENT OF THE FACTS

Although the Property Owners sued the Manufacturers and Household International claiming that they were damaged by polybutylene plumbing systems [R.

548-518, 914-885], ***the Property Owners never mention Household International in their Statement of Facts.*** [Appellants' Brief, pp. xviii-xxiv]. This is ***because Household International is unlike any other Appellee in this lawsuit.*** Household International has never designed, manufactured, or marketed any plumbing part or system. [R. 111]. Furthermore, Household International has never provided any raw material used in any plumbing part or system. [R. 111]. Indeed, Household International is merely a holding company whose only alleged connection to this lawsuit stems from its former ownership of a subsidiary company, Household Manufacturing, Inc.,[1] which in turn owned Hydrometals, Inc., which in turn owned United States Brass Corporation ("U.S. Brass"). [R. 87, 111]. Based solely on Household International's indirect ownership interest, the Property Owners have sued Household International for alleged violations of 18 U.S.C. § 1962 of the RICO Act. [R. 548-518, 914-885]. Household International, however, denies that it participated in any scheme to defraud, conspiracy, marketing effort or made any representations and/or omissions regarding polybutylene plumbing systems.

---

[1] A predecessor of U.S. Brass, Qest Products, Inc., began designing, manufacturing and/or marketing polybutylene plumbing systems in the mid- to late 1970s. Household International acquired U.S. Brass' owner, Wallace Murray Corporation, in 1981, and Wallace Murray changed its name to Household Manufacturing (now known as Eljer Manufacturing, Inc.). Household International owned Household Manufacturing for a brief period of time (February 20, 1981 to April 14, 1989).

SUMMARY OF THE ARGUMENT

ISSUE NUMBER 1

The District Court's dismissal of the Property Owners' civil RICO claims should be affirmed because the District Court, through Judge David Hittner, properly dismissed the claims under Rule 12(b)(6) because the Property Owners cannot plead or prove detrimental reliance as proof of proximate cause since the Property Owners admit that they did not detrimentally rely on the alleged fraudulent statements. District Courts in the Fifth Circuit, as well as other Circuits, require detrimental reliance to prove proximate cause for civil RICO claims based on mail and/or wire fraud. This requirement ensures the existence of a direct relationship between the injury asserted and the alleged conduct. Without precedent from this Court on this specific issue, Judge Hittner correctly relied on the holdings of a District Court within the Fifth Circuit, and on the reasoning and analysis of Circuit Courts that had "thoroughly and persuasively" addressed this issue. Moreover, the decisions Judge Hittner relied on are consistent with this Court's rulings in other civil RICO cases. Namely, requiring: a high standard of pleading and proof to support a civil RICO claim, that plaintiffs plead and prove both legal and proximate cause to support their injury, and that plaintiffs plead with specificity and particularity.

Because the Property Owners admit that they must prove proximate cause, but also admit that they did not detrimentally rely on the alleged fraudulent statements, the Property Owners argue that a generic "scheme to defraud" or "systemic reliance" should be sufficient to

prove proximate cause. However, no U.S. Supreme Court or Fifth Circuit case recognizes a general "scheme to defraud" or "systemic reliance" as an appropriate alternative to detrimental reliance as proof of proximate cause in a civil RICO case.

ISSUE NUMBER 2

The District Court properly denied the Property Owners' Motion to Amend or Alter the Judgement and For Reconsideration Under Rule 59(e) in the *July Reconsideration Order* because the Property Owners "failed to present new or persuasive arguments" to support their motion. [R. 1344]. Moreover, Judge Hittner did not rely on *Holmes* to dismiss the Property Owner's civil RICO claims because Judge Hittner had already dismissed the Property Owner's claims in a May 21, 1999 *Memorandum Opinion and Order*, and in a May 21, 1999 *Final Order of Dismissal* (collectively referred to as the *"May Dismissal Order"*), and because *Holmes* does not address detrimental reliance. [R.1243, 1242-1238].

CROSS-POINT

The dismissal should be alternatively affirmed because the Property Owners failed to plead their claims with the specificity and particularity required of civil RICO claims in the Fifth Circuit, and because they failed to plead that Household International committed a predicate act. The allegations in the Property Owners' Second Amended Complaint are based on alleged mail and wire fraud. Rule 9(b), *Federal Rules of Civil Procedure*, requires that all allegations of fraud be plead with particularity.

Moreover, the Fifth Circuit consistently requires that civil RICO allegations be plead with a high degree of specificity and in accordance with Rule 9(b). Because the Property Owners' complaint fails to plead their claims with the specificity and particularity required, and because they failed to plead that Household International committed a predicate act, the dismissal of their civil RICO claims should be affirmed.

ARGUMENT

I. THE DISTRICT COURT PROPERLY DISMISSED THE PROPERTY OWNERS' CIVIL RICO CLAIMS BECAUSE THE PROPERTY OWNERS ADMITTED THEY DID NOT RELY ON THE ALLEGED FRAUDULENT STATEMENTS, AND THUS THEY COULD NOT PLEAD AND PROVE DETRIMENTAL RELIANCE AS PROOF OF PROXIMATE CAUSE UNDER 18 U.S.C § 1964(C).

A. STANDARD OF REVIEW

This Court reviews *de novo* a district court's dismissal on the pleadings. *Morin v. Caire*, 77 F.3d 116, 120 (5th Cir. 1996). A dismissal is proper if the complaint lacks an allegation regarding a required element necessary to obtain relief. *Blackburn v. City of Marshall*, 42 F.3d 925, 931 (5th Cir. 1995). In addition, a dismissal is proper when no relief could be awarded under any set of facts that could be proven consistent with the allegations. *McConathy v. Dr. Pepper/Seven Up Corp.*, 131 F.3d 558, 561 (5th Cir. 1998). "[T]o avoid dismissal [under Rule 12(b)(6)], a plaintiff must plead specific facts, not mere conclusory allegations. . . . " *Guidry v. Bank of LaPlace*, 954 F.2d 278,

281 (5th Cir. 1992) (quoting *Elliot v. Foufas*, 867 F.2d 877, 881 (5th Cir. 1989)). It is not necessary or proper to assume that the plaintiffs can prove facts that they have not alleged. *Campbell v. Wells Fargo Bank, N.A.*, 781 F.2d 440, 442 (5th Cir.), *cert. denied*, 476 U.S. 1159 (1986).

B. THE PROPERTY OWNERS MUST PLEAD AND PROVE BOTH THE PREDICATE ACTS AND PROXIMATE CAUSE.

The Property Owners refuse to acknowledge the distinction between pleading and proving the predicate acts of mail and wire fraud and pleading and proving proximate cause. [R. 1345]. Instead, the Property Owners contend that, because detrimental reliance is not required to plead or prove a mail or wire fraud violation, detrimental reliance is also not required to plead or prove proximate cause in a civil RICO case. [Appellants' Brief, pp. 4-6]. However, merely proving mail and wire fraud does not also prove the proximate cause required for a civil RICO claim; each one has different elements. *See* 18 U.S.C. §§ 1341 and 1343; 18 U.S.C. § 1961 *et seq.*; *Brandenburg v. Seidel*, 859 F.2d 1179 (4th Cir. 1988); *Pelletier v. Zweifel*, 921 F.2d 1465, 1499 (11th Cir.), *cert. denied*, 502 U.S. 855 (1991); *Heden v. Hill*, 937 F.Supp. 1230 (S.D. Tex.1996).

Moreover, as Judge Hittner recognized, "[t]he clear language of the [RICO] statute imposes three separate requirements: (1) injury to the plaintiff's business or property; (2) proximate causation ("by reason of"); and (3) the underlying wrong (the predicate act or section 1962 violation)." [R. 1240]. However, the Property Owners admit that they "did not rely on anything said or

published in purchasing their properties." [R. 1198, 1241]. Therefore, even if the Property Owners could prove property damages and a mail and/or wire fraud violation (which Household International adamantly denies), they have only satisfied the first and third requirements of the RICO statute. The Property Owners must still satisfy the second requirement and prove proximate cause – which of course requires proof of detrimental reliance.

C. DISTRICT COURTS IN THE FIFTH CIRCUIT, AS WELL AS OTHER CIRCUIT COURTS, REQUIRE DETRIMENTAL RELIANCE TO PROVE PROXIMATE CAUSE IN CIVIL RICO CASES BASED ON MAIL AND WIRE FRAUD.

Contrary to the Property Owners' assertions, District Courts in the Fifth Circuit require proof of detrimental reliance to prove proximate cause in a civil RICO case based on mail and wire fraud. *See, Heden*, 937 F.Supp. at 1243-44 and *Brown v. Coleman Investments, Inc.*, 993 F.Supp. 416, 427 (M.D. La. 1998). In addition, other Circuits that have addressed this issue, including the Fourth and Eleventh Circuits, require detrimental reliance to prove proximate cause in a civil RICO case based on mail and/or wire fraud. Finally, although this Court has not specifically addressed this issue, other Fifth Circuit opinions discussing civil RICO claims are consistent with concluding that detrimental reliance is a necessary element to prove proximate cause.

1. DISTRICT COURT DECISIONS WITHIN THE FIFTH CIRCUIT HAVE REQUIRED DETRIMENTAL RELIANCE TO PROVE PROXIMATE CAUSE IN A CIVIL RICO CASE.

In *Heden*, the District Court for the Southern District of Texas held that:

> [u]nlike . . . criminal RICO prosecutions, civil RICO plaintiffs must allege and prove reliance in cases using the mail and wire fraud statutes as predicate offenses. *Id.* (citing *Pelletier* [ ], 921 F.2d [at] 1499 [ ]). Therefore, [a plaintiff] cannot maintain a civil RICO claim against [a defendant] absent evidence that [the defendant] made misrepresentations or omissions of material fact to [the plaintiff], through the use of the mails or wires, ***and evidence that [the plaintiff] relied on those misrepresentations or omissions to his detriment.*** (citations omitted).

Heden, 937 F.Supp. at 1243 (emphasis added). In that case, the *Heden* Court found that the defendants' communications were insufficient to establish civil RICO liability because those communications were made to a third-party and not to the plaintiff. *Id.*, at 1243. Likewise, the Property Owners admit that the alleged wrongful communications were made not to themselves, but to third parties, such as the "plumbing and construction industry," "builders," "developers," and "plumbing distributors." [R. 1198, 1241; Appellants' Brief, pp. xviii-xxiv]. The Property Owners also admit that they did not detrimentally rely on any alleged misrepresentation or omission by the Manufacturers. [R. 1198, 1241]. Nor can they prove detrimental reliance as to Household International

because no Property Owner has shown (nor can they show) that Household International made any misrepresentations or omissions to them. [R. 548-518, 914-885, 1198, 1241; Appellants Brief, pp. xviii-xxiv]. This fact is demonstrated by the Property Owners' complete omission of any reference to Household International in their Statement of Facts. [Appellants' Brief, pp. xviii-xxiv].

In addition to *Heden*, another District Court in this Circuit has held that when a plaintiff alleges mail and wire fraud as predicate acts under civil RICO, the plaintiff must comply with Rule 9(b), *Federal Rules of Civil Procedure*, and "particularly plead the following elements of fraud: '1) a misstatement or omission; 2) of material fact; 3) made with the intent to defraud; 4) ***on which the plaintiff relied***; and 5) which proximately caused the plaintiff's injury.' " *Brown*, 993 F.Supp. at 427 (referring to *Williams v. WMX Technologies, Inc.*, 112 F.3d 175, 177 (5th Cir.), *cert. denied*, 522 U.S. 966 (1997)) (emphasis added). In this case, however, the Property Owners have not pled, and cannot plead, detrimental reliance because they admit that they did not rely on the alleged fraudulent statements. [R. 1198, 1241].

Accordingly, because the Property Owners admit that they cannot plead or prove detrimental reliance as required by both *Heden* and *Brown*, the Property Owners' civil RICO claims do not meet the fundamental requirements laid out by District Courts in this Circuit. Therefore, the District Court's dismissal of the Property Owners' civil RICO claims should be affirmed.

2. CIRCUITS THAT HAVE ADDRESSED THIS ISSUE REQUIRE DETRIMENTAL RELIANCE TO PROVE PROXIMATE CAUSE IN A CIVIL RICO CASE.

Circuit courts deciding this issue require detrimental reliance to prove proximate cause. Specifically, the Second, Fourth, Sixth and Eleventh Circuits all require a civil RICO plaintiff to prove that he or she detrimentally relied on the defendant's alleged misrepresentations. *See, e.g., Metromedia Co. v. Fugazy*, 983 F.2d 350, 368 (2d Cir. 1992), *cert. denied*, 508 U.S. 952 (1993); *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1311 (2d Cir. 1990); *Chisolm v. TranSouth Fin. Corp.*, 95 F.3d 331, 337 (4th Cir. 1996); *Brandenburg*, 859 F.2d at 1188 fn. 10; *Central Distrib. of Beer, Inc. v. Conn*, 5 F.3d 181, 184 (6th Cir. 1993), *cert. denied*, 512 U.S. 1207 (1994); *Blount Fin. Servs., Inc. v. Walter E. Heller & Co.*, 819 F.2d 151, 152 (6th Cir. 1987); *Beck v. Prupis*, 162 F.3d 1090, 1097 (11th Cir. 1998), *cert. granted*, ___ U.S. ___ 1999 U.S. LEXIS 4001 (U.S. June 7, 1999) (No. 98-1480); *Pelletier*, 921 F.2d at 1499-1500. All of these courts recognize that "a showing of reliance on the predicate act of fraud ensures the existence of a 'direct relation between the injury asserted and the injurious conduct alleged,' " and that nothing less than detrimental reliance will prove the "direct relation." *Chisolm*, 95 F.3d at 337 (quoting *Holmes*, 503 U.S. at 268). Therefore, when Judge Hittner dismissed the Property Owners' civil RICO claims, he relied on *Brandenburg* and *Pelletier* because these courts had "thoroughly and persuasively addressed" the issue. [R. 1240]. *See, Brandenburg* and *Pelletier, supra.*

In *Brandenburg*, the Fourth Circuit explained the reasoning for requiring detrimental reliance to prove proximate cause in a civil RICO case:

> to find, or assume, that . . . acts of mail and wire fraud ha[ve] been shown does not also establish that its intended victims were injured, nor beyond that, that any injury suffered by them was sufficiently caused by the acts to create RICO liability. This follows because indictable acts of mail or wire fraud may be proven without any proof of detrimental reliance by, hence of injury to, the intended victims.

Brandenburg, 859 F.2d at 1187 (referencing *Armco Indus. Credit Corp. v. SLT Warehouse Co.*, 782 F.2d 475, 481-82 (5th Cir. 1986)). The Fourth Circuit recognized, therefore, that without detrimental reliance, plaintiffs could not prove that they were injured or that their injury was caused by the alleged fraud. Moreover, the *Brandenburg* Court recognized that this position was consistent with the language in the RICO Act and held that under civil RICO,

> a private plaintiff must demonstrate not only that the defendants have violated § 1962 [*i.e.*, the predicate act], but also that he has been "injured in his business or property by reason of [the alleged predicate act.]"

Brandenburg, 859 F.2d at 1187 (quoting 18 U.S.C. § 1964(c)). The *Brandenburg* Court interpreted this statutory language to mean that a civil RICO plaintiff must make "two closely related showings: (1) that he has suffered injury to his business or property; and (2) that this injury was caused by the predicate acts of racketeering

activity that make up the violation of § 1962." *Brandenburg*, 859 F.2d at 1187. The *Brandenburg* Court also referenced the well-recognized public policy reasons for requiring detrimental reliance to prove proximate cause in a civil RICO case. Specifically, that a defendant that commits a predicate act " 'is not liable for treble damages to everyone he might have injured by other conduct, nor is [he] liable to those who have not been injured.' " *Id.*, at 1187 (quoting *Haroco, Inc. v. American Nat'l Bank & Trust Co.*, 747 F.2d 384, 398 (7th Cir. 1984), *aff'd*, 473 U.S. 606 (1985)).

In addition, the *Brandenburg* Court recognized that the U.S. Supreme Court had approached the issue of proximate cause from a slightly different perspective, but ultimately came to the same conclusion. Specifically, even though the Supreme Court considered the injury and causation requirements to be "aspects of standing, rather than elements of the civil RICO plaintiff's prima facie case," *Brandenburg*, 859 F.2d at 1187 (referencing *Sedima, SPRL v. Imrex Co., Inc.*, 473 U.S. 479, 496-97 (1985)), "it is clear that a civil RICO complaint is vulnerable to a motion to dismiss if it fails to allege . . . an adequate causal nexus between that injury and the [alleged] predicate acts of racketeering activity. . . . (Citations Omitted.)" *Brandenburg*, 859 F.2d at 1187. Indeed, the "adequate causal nexus" is proof of detrimental reliance. Judge Hittner relied on *Brandenburg* because it articulated the difference between proving a predicate act (i.e., the underlying act of mail or wire fraud) and proving proximate cause. [R. 1240]. That is, while "it is not necessary to establish detrimental reliance by the [plaintiff] in order to make out a violation of the federal mail fraud statute, see

Armco Indus., 782 F.2d at 481-82, ***such reliance is necessary to establish injury to business or property 'by reason of' a predicate act of mail fraud within the meaning of § 1964(c).***" *Brandenburg*, 859 F.2d at 1188 fn. 10 (emphasis added); [R. 1240-1239]. Therefore, because the Property Owners admit that they did not rely on the alleged fraudulent statements, the Property Owners cannot plead or prove detrimental reliance (and hence proximate cause). [R. 1198, 1241].

The Eleventh Circuit used similar reasoning to reach the same conclusion. *See, Pelletier, supra.* Relying on the Supreme Court's decision in *Sedima*, the *Pelletier* Court held that a private

> plaintiff cannot allege merely that an act of racketeering occurred and that he lost money [or property.] He must show a causal connection between his injury and a predicate act.

Pelletier, 921 F.2d at 1497. Likewise, the Property Owners admit they must show a causal connection (i.e., proximate cause) between their alleged injuries and the alleged mail and wire fraud. [Appellants' Brief, p. 3]. Moreover, the *Pelletier* Court, like the *Heden* Court, noted an important distinction between criminal and civil RICO claims based on mail and/or wire fraud. *Id.*, 921 F.2d at 1499. (Although the government prosecuting a defendant for mail or wire fraud "is not required to show that the intended victim was actually deceived and suffered injury. (Citations Omitted.) A civil RICO plaintiff must show . . . that he was injured by reason of the defendant's acts of deception.") Therefore, the *Pelletier* Court held that to properly plead and prove that an injury is proximately caused by reason of the mail or wire fraud "the

plaintiff must have been a target of the scheme to defraud ***and must have relied to his detriment on misrepresentations made in furtherance of that scheme.***" *Pelletier*, 921 F.2d at 1499-1500 (emphasis added). Finally, in the most recent Circuit court decision on this issue, the Eleventh Circuit re-affirmed its earlier position in *Pelletier* when it denied the plaintiffs' civil RICO claims based on alleged misrepresentations to third parties because the plaintiffs did not detrimentally rely on these allegations. *Johnson Enters. of Jacksonville, Inc. v. FPL Group, Inc.*, 162 F.3d 1290, 1318 (11th Cir. 1998) (citing *Pelletier*, 921 F.2d at 1499-1500.)

Therefore, like the District Courts in the Fifth Circuit, other Circuit Courts, including the Fourth and the Eleventh, require detrimental reliance to prove proximate cause in a civil RICO case based on mail and wire fraud. Because the Property Owners admit that they did not detrimentally rely on the alleged fraudulent statements [R. 1198, 1241], the Property Owners cannot prove proximate cause to support their civil RICO claims. Accordingly, the District Court's dismissal of the Property Owners' civil RICO claims should be affirmed.

3. THIS COURT HAS NOT ADDRESSED THIS SPECIFIC ISSUE.

Household International disagrees with the Property Owners' assertion that this Court has "well-settled jurisprudence" on this issue. [Appellants' Brief, p. 5]. Instead, Household International agrees with Judge Hittner that, while the *Armco* decision does not require proof of detrimental reliance to prove the underlying wrong (i.e., a

mail or wire fraud violation) (*Id.*, at 481-82), neither *Armco* nor the Fifth Circuit has addressed the issue of whether detrimental reliance is a necessary element of the proximate cause requirement under § 1964(c) of the RICO statute. [R. 1240].

In addition, although the Property Owners claim *Akin v. Q-L Investments, Inc.*, 959 F.2d 521 (5th Cir. 1992), *Laird v. Integrated Resources, Inc.*, 897 F.2d 826 (5th Cir. 1990), and *Abell v. Potomac Insurance Co.*, 858 F.2d 1104 (5th Cir. 1988), *vacated on other grounds*, 492 U.S. 914 (1989) are Fifth Circuit authority in accord with their understanding of *Armco*, [Appellants' Brief, p. 5], none of these cases address the issue of whether detrimental reliance is a necessary element of the proximate cause requirement under the RICO Act. (Judge Hittner's second requirement.) Rather, these cases, like *Armco*, merely hold that detrimental reliance is not necessary to plead and prove mail and/or wire fraud. (Judge Hittner's third requirement – the underlying wrong.) *See, Armco*, 782 F.2d at 481-82; *Akin*, 959 F.2d at 533; *Laird*, 897 F.2d at 839 fn. 53; and *Abell*, 858 F.2d at 1129.

Because this Court has not specifically addressed the issue of whether detrimental reliance is a necessary element of the proximate cause requirement in a civil RICO case based on mail and wire fraud, Judge Hittner correctly referred to and relied upon the reasoning and analysis of a District Court within this Circuit and of Circuit Courts that had decided this specific issue. Accordingly, the District Court's dismissal of the Property Owners' civil RICO claims should be affirmed.

4. THE DISTRICT COURT PROPERLY RELIED ON THE REASONING AND ANALYSIS OF A DISTRICT COURT WITHIN THE FIFTH CIRCUIT, AND IN THE FOURTH AND ELEVENTH CIRCUITS, BECAUSE THE REASONING AND ANALYSIS THEREIN IS CONSISTENT WITH THIS COURT'S RULINGS IN OTHER CIVIL RICO CASES.

Without specific precedent on this issue, Judge Hittner logically consulted Circuit court decisions that had "thoroughly and persuasively" addressed this issue, as well as a District Court decision within the Fifth Circuit. [R. 1240-1239]. *See Brandenburg, Pelletier,* and *Heden, supra.* From these decisions, Judge Hittner reasonably concluded that

> absent an allegation that [Household International] made material misrepresentations to [the Property *Owners] and that [the Property Owners] relied on the mail and wire fraud on which the Civil RICO claims are predicated, [the Property Owners] cannot satisfy the proximate causation requirement for purposes of Civil RICO.*

[R. 1239] (emphasis added). The reasoning and analysis Judge Hittner used is both logical and consistent with other Fifth Circuit decisions in civil RICO cases. Specifically, those decisions which require: a high standard of pleading and proof; that plaintiffs prove legal and proximate cause to support their injury; and specificity and particularity to sustain a claim. *See, Williams,* 112 F.3d at 177; *In re Burzynski,* 989 F.2d 733, 744 (5th Cir. 1993); *Tel-Phonic Services, Inc. v. TBS Intern., Inc.,* 975 F.2d 1134, 1138

(5th Cir. 1992); [R. 1240-1238; 1345-1344]. Accordingly, the District Court's dismissal of the Property Owners' civil RICO claims should be affirmed.

D. A GENERAL "SCHEME TO DEFRAUD" IS NOT A RECOGNIZED ALTERNATIVE FOR DETRIMENTAL RELIANCE AS PROOF OF PROXIMATE CAUSE IN A CIVIL RICO CASE BASED ON MAIL OR WIRE FRAUD IN ANY CONTROLLING JURISDICTION.

The Property Owners admit that they did not detrimentally rely on the alleged fraudulent statements. [R. 1198, 1241]. The Property Owners also admit that they must prove, *inter alia*, proximate cause to establish their civil RICO claims. [Appellants' Brief, p. 3]. Therefore, in a desperate attempt to establish proximate cause, and to save their civil RICO claims from dismissal, the Property Owners assert that the Manufacturers' engaged in a general "scheme to defraud" by "marketing [the polybutylene plumbing system] to the code bodies and the builders and plumbers, who worked on [the Property Owners'] properties, [and] that resulted in [the Property Owners'] injury." [Appellants' Brief, p. 6]. However, the *Heden* Court specifically held that

> ***"[a]lthough a general fraudulent scheme which incidentally affects a person may support other civil claims against the wrongdoer, the victim cannot assert a RICO claim absent evidence that the defendant made representations to the victim."***

Heden, 937 F.Supp. at 1244 (quoting *Central Distrib. of Beer*, 5 F.3d at 184) (emphasis added). In fact, no U.S. Supreme

Court or Fifth Circuit case has recognized a general "scheme to defraud" or "systemic reliance" as proof of proximate cause in a civil RICO case. [Appellants' Brief, pp 1-30].

As alleged support for their "general scheme to defraud"and "systemic reliance" argument, the Property Owners cite to numerous non-RICO cases involving the purchase and sale of stocks, bonds and other types of investment securities. [Appellants' Brief, pp. 6-9]. The only RICO case the Property Owners do cite is *Schacht v. Brown*, 711 F.2d 1343, 1352 (7th Cir. 1983), for the proposition that the RICO injury could "flow from [the] whole scheme." [Appellants' Brief, p. 7]. However, *Schacht* is easily distinguishable because it was not governed by the Fifth Circuit authority which requires pleading RICO and fraud claims with specificity and particularity in accordance with Rule 9(b) (see *Williams, Tel-Phonic* and *In re Burzynski*). Instead, the *Schacht* Court was "guided by . . . the 'liberal pleading policy of [Rule 8, *Federal Rules of Civil Procedure*, which] prevents dismissal of a meritorious action for purely formal or technical reasons. . . . ' " *Schacht*, 711 F.2d at 1352 (quoting *Murphy v. White Hen Pantry Co.*, 691 F.2d 350, 353 (7th Cir. 1982)). Because the *Schacht* decision is inconsistent with well-established Fifth Circuit authority, *Schacht* is not controlling in this case.

Finally, because the Property Owners lack supporting case law, they simply argue that such a general "scheme to defraud. . . . ***should be*** sufficient" to establish liability on the Manufacturers in a civil RICO case. [Appellants' Brief, p. 7] (emphasis added). However, the *Heden* Court has squarely addressed this proposal and determined that

a general scheme is insufficient to support a civil RICO claim "absent evidence that the defendants made representations to the victim." *Id.*, at 1244. This standard of course, requires a finding of detrimental reliance. Accordingly, the District Court's dismissal of the Property Owners' civil RICO claims should be affirmed.

II. THE DISTRICT COURT PROPERLY DENIED THE PROPERTY OWNERS' MOTION TO AMEND OR ALTER JUDGMENT AND FOR RECONSIDERATION UNDER RULE 59(E).

A. JUDGE HITTNER DID NOT BASE HIS DISMISSAL ON *HOLMES V. SECURITIES INVESTOR PROTECTION CORP*, 503 U.S. 258 (1992).

Incredibly, the Property Owners spend considerable time arguing an issue that was never raised or discussed by the District Court in its *May Dismissal Order* dismissing the Property Owner's claims. [Appellants' Brief, pp. 9-30]. Specifically, Judge Hittner did not "misread . . . *Holmes* . . . . [when he] dismiss[ed] [the Property Owners'] civil RICO [claims] . . . " [Appellants' Brief, p. 9]. In fact, Judge Hittner did not even cite *Holmes* in his *May Dismissal Order*. [R. 1242-1238]. Instead, Judge Hittner dismissed the Property Owners' civil RICO claims because:

> absent an allegation that [the Manufacturers and Household International] made material misrepresentations to [the Property Owners] and that [the Property Owners] relied on the mail and wire fraud on which the Civil RICO claims are predicated, [the Property Owners] cannot satisfy

> the proximate causation requirement for purposes of Civil RICO. As a result, [the Property Owners'] Civil RICO claim[s] must be dismissed.

[R. 1239].

B. *HOLMES* DOESN'T ADDRESS DETRIMENTAL RELIANCE

Judge Hittner did not base his dismissal of the Property Owners' civil RICO claims on *Holmes* because *Holmes* never addressed the issue of whether detrimental reliance is a necessary element of RICO's proximate cause requirement in a mail or wire fraud case. Rather, the question in *Holmes* was more general and centered on whether RICO's "by reason of" language included a proximate cause requirement. The Supreme Court answered that question in the affirmative. *Holmes*, 503 U.S. at 266 fn. 12 ("we hold . . . [that the 'by reason of' language of § 1964(c)] carries a proximate-cause requirement.") Thus, rather than undermining Judge Hittner's *May Dismissal Order*, *Holmes* actually supports Judge Hittner's holding that the civil RICO statute requires the Property Owners to prove proximate cause. [R. 1240] ("The clear language of the statute imposes . . . proximate causation. . . . ").

Furthermore, Judge Hittner did not need to rely on *Holmes* to dismiss the Property Owners' civil RICO claims because he had other authority directly on point. Judge Hittner specifically referred to, and specifically relied upon, *Heden*, *Brandenburg* and *Pelletier*. [R. 1242-1238; 1346-1344]. Each of these cases specifically addressed the issue before Judge Hittner, and each of these cases

squarely held that detrimental reliance is required to prove proximate cause. *Heden*, 937 F.Supp. at 1243; *Brandenburg*, 859 F.2d at 1188 fn. 10; *Pelletier*, 921 F.2d at 1499-1500. Notably, none of these decisions is predicated on *Holmes*. Therefore, Judge Hittner acted properly by basing his dismissal on *Heden*, *Brandenburg* and *Pelletier;* and by not basing his dismissal on *Holmes*. *Heden*, 937 F.Supp. at 1243; *Brandenburg*, 859 F.2d at 1188 fn. 10; *Pelletier*, 921 F.2d at 1499-1500. Accordingly, the District Court's dismissal of the Property Owners' civil RICO claims should be affirmed.

C. JUDGE HITTNER DENIED THE PROPERTY OWNERS' MOTION BECAUSE THEY FAILED TO PRESENT NEW OR PERSUASIVE ARGUMENTS IN SUPPORT OF THEIR MOTION.

In response to the dismissal, the Property Owners filed a Motion to Alter or Amend Judgment and for Reconsideration Under Rule 59(e) and a Supplement to the motion. [R. 1340; 1279-1266; 1315-1312]. However, as Judge Hittner noted, the purpose of Rule 59(e), *Federal Rules of Civil Procedure*, is to "correct manifest errors of law or fact or ~~to~~ present newly discovered evidence." *Simon v. United States*, 891 F.2d 1154, 1159 (5th Cir. 1990); [R. 1346]. Moreover, this motion is not the "proper vehicle for rehashing old arguments. . . . " *Resolution Trust Corp. v. Holmes*, 846 F.Supp. 1310, 1316 (S.D. Tex. 1994); [R. 1346]. Pursuant to this standard, Judge Hittner issued his *July Reconsideration Order* ***denying the Property Owners' Rule 59(e) motion because the Property Owners did not raise any new arguments.*** [R. 1346-1344]

(emphasis added). Indeed, the critical language in that *July Reconsideration Order* states:

> III. CONCLUSION AND ORDER
>
> Based on the foregoing, the Court concludes that [the Property Owners] have failed to present new or persuasive arguments in support of their Rule 59(e) Motion. The law regarding the necessary proof required of civil RICO plaintiffs is clear. [The Property Owners] are correct that reliance is not required to establish the predicate act element of civil RICO, if the predicate act is either mail fraud or wire fraud. [The Property Owners] must, however, satisfy the remaining elements of their civil RICO claim, including the proximate causation requirement. Accordingly, it is hereby
>
> ORDERED that [the Property Owners'] Motion to Alter or Amend Judgment and for Reconsideration Under Rule 59(e) (Instrument No. 121) is DENIED.

[R. 1344]. Nothing in this *July Reconsideration Order* suggests that Judge Hittner did anything other than deny the Property Owners' Rule 59(e) motion. [R. 1346-1344]. Clearly, Judge Hittner's *July Reconsideration Order* ***did not and could not*** dismiss the Property Owners' civil RICO claims because they had already been dismissed by his *May Dismissal Order*. [R. 1243, 1242-1238]. Accordingly, the District Court's denial of the Property Owners' Motion to Alter or Amend the Judgment and For Reconsideration Under Rule 59(e) should be affirmed.

CROSS-POINT

THE DISTRICT COURT'S DISMISSAL OF THE PROPERTY OWNERS' CIVIL RICO CLAIMS SHOULD BE ALTERNATIVELY AFFIRMED BECAUSE THE PROPERTY OWNERS FAILED TO PROPERLY PLEAD A RICO CLAIM.

A. STANDARD OF REVIEW

A dismissal is justified when the complaint fails to properly plead a civil RICO claim based on fraud. *Williams*, 112 F.3d at 180. (Court reversed district court's denial of motion to dismiss and remanded with instructions to dismiss because complaint failed to plead fraud claims with particularity required by Rule 9(b).) Moreover, a dismissal is proper if the plaintiffs have had two attempts to plead their claims. *Id.* Here, the Property Owners' Second Amended Complaint still did not plead their civil RICO claims with the specificity and particularity required, and still did not alleged that Household International had committed a predicate act. [R. 914-885]. Accordingly, the District Court's dismissal of the Property Owners' claims should be affirmed because, even after two attempts, the Property Owners have not properly plead a RICO claim.

B. THIS COURT MAY AFFIRM THE DISTRICT COURT'S DISMISSAL ON ALTERNATIVE GROUNDS.

In its *Motion to Dismiss*, its *Memorandum of Points and Authorities in Support of its Motion to Dismiss*, and its *Renewed Motion to Dismiss* Household International asserted that the Property Owners' civil RICO claims should be

dismissed because they "failed to satisfy the pleading requirements for claims brought under the RICO Act." [R. 76, 94 and 1039]. Specifically, Household International asserted that the Property Owners' civil RICO claims should be dismissed because they: (1) failed to state their claims with the specificity and particularity required, and (2) failed to allege that Household International committed any RICO violation, and therefore, they have not alleged, and cannot allege that their injuries were caused by Household International. [R. 76, 94 and 1039]. Although these arguments were properly raised and presented in the trial court, Judge Hittner did not rule upon these points in his *May Dismissal Order* dismissing the Property Owners' civil RICO claims [R. 1242-1238]. However, even though Judge Hittner did not rule upon these arguments when he dismissed the Property Owners' civil RICO claims, this Court may affirm Judge Hittner's dismissal on these alternative grounds. *See, Esteves v. Brock,* 106 F.3d 674, 676 (5th Cir.), *cert. denied,* 522 U.S. 828 (1997); *Brandenburg,* 859 F.2d at 1184.

C. THE PROPERTY OWNERS FAILED TO PLEAD WITH THE SPECIFICITY AND PARTICULARITY REQUIRED FOR FRAUD AND RICO CLAIMS.

The Property Owners' civil RICO claims against Household International are based on allegations of fraud. [Appellants' Brief, pp. xviii-xxiv; R. 905-897; 890-888]. Although the general pleading requirements under Rule 8(a), *Federal Rules of Civil Procedure,* allow "a short and plain statement of the grounds" alleged, it is well-recognized that the higher pleading burden of Rule

9(b) applies for fraud claims. *Tuchman v. DSC Communications Corp.*, 14 F.3d 1061, 1067, *reh'g denied*, 20 F.3d 1172 (5th Cir. 1994) (en banc); *see also* Fed. R. Civ. P. 9(b) ("In all averments of fraud . . . , the circumstances constituting fraud . . . shall be stated with particularity."). Moreover, claims under the RICO Act must be stated with a high degree of specificity because the Fifth Circuit applies Rule 9(b) to claims involving mail and/or wire fraud under the RICO Act. *Williams, Inc.*, 112 F.3d at 177; *Tel-Phonic Services, Inc.*, 975 F.2d at 1138; *Heden*, 937 F.Supp. at 1243-44. Accordingly, Rule 9(b) applies to the Property Owners' civil RICO claims based on mail and/or wire fraud and, therefore, the Property Owners' pleadings must satisfy both the RICO Act requirements, and the requirements of Rule 9(b), *Federal Rules of Civil Procedure*:

> Rule 9(b) requires particularity in pleading the "circumstances constituting fraud." This particularity requirement applies to the pleading of fraud as a predicate act in a RICO claim as well.

Tel-Phonic Services, Inc., 975 F.2d at 1138.

The Fifth Circuit is particularly strong in its insistence that RICO pleadings be precise and specific. In *In re Burzynski*, this Court commented on the dangers of permitting RICO claims to proceed without satisfying the particularity requirements:

> The difficulty is that the pleading the plaintiff relies on . . . is too general, speculative, and unsupported by facts. To permit it to serve the plaintiff's purposes would allow conclusory pleading to erode the substance of the "continuity," "enterprise," and "pattern" requirements.

Id., 989 F.2d at 744. Like the plaintiffs in *In re Burzynski*, the Property Owners only make conclusory allegations. [R. 890-885]. However, unlike well-pleaded allegations, conclusory allegations are not accepted as true when evaluating a Rule 12(b)(6) motion. *Kaiser Aluminum & Chemical Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1050 (5th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983). In short, the Property Owners' Second Amended Complaint provides none of the content required by Rule 9(b), *Federal Rules of Civil Procedure*, and the aforementioned case law. [Appellants' Brief, pp. xviii-xxiv; R. 905-897; 890-888].

Furthermore, this Court's opinion in *Williams* mandates the dismissal of the Property Owners' civil RICO claims against Household International. *Williams* first reaffirmed that Rule 9(b) applies to civil RICO claims based on fraud. *Id.*, at 177. *Williams* then defined "pleading fraud with particularity" for cases in the Fifth Circuit:

> [p]leading fraud with particularity . . . requires "time, place and contents of the false representations, as well as the identity of the person making the misrepresentation and what [that person] obtained thereby."

Williams, at 177 (quoting *Tuchman*, 14 F.3d at 1068). *Williams* additionally detailed why the plaintiffs' allegations of oral and written misrepresentations failed to meet the particularity pleading requirements of Rule 9(b). The complaint failed to sufficiently plead alleged oral misrepresentations when it failed to "state a place or time that these representations were made." *Id.*, at 178. In addition, the complaint failed to sufficiently plead the alleged written misrepresentations due to its lack of specificity.

"[Plaintiffs] lack of specificity as to which portion is false and why prevents this portion of the complaint from meeting the standard of pleading set out in Rule 9(b)." *Id.*, at 179. Similarly, in *Bonton v. Archer Chrysler Plymouth, Inc.*, 889 F.Supp. 995 (S.D. Tex. 1995), the District Court held that to satisfy Rule 9(b)'s pleading requirements for fraud allegations, "a plaintiff must ***at a minimum*** allege the 'time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby.' " *Bonton*, 889 F.Supp. at 1004 (quoting *Tel-Phonic Servs., Inc.*, 975 F.2d at 1139 (quoting 5 C. WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 1297, at 590)) (emphasis added).

As in *Williams* and *Bonton*, the Property Owners have failed to plead their RICO claims with the specificity and particularity required by Rule 9(b). Specifically, their Second Amended Complaint does not sufficiently plead any misrepresentation or omission by Household International because they fail to allege (a) any misrepresentation or omission by Household International as opposed to some other separate and distinct corporate defendant; (b) the time, place, or contents of the alleged false representation; and (c) the identity of the person making the representation and what he or she obtained thereby. [Appellants' Brief, pp. xviii-xxiv; R. 905-897; 890-888]. Accordingly, the District Court's dismissal of the Property Owners' claims should be affirmed because the Property Owners failed to plead with the specificity and particularly required for fraud and RICO claims.

D. THE PROPERTY OWNERS' FAILED TO PLEAD THAT HOUSEHOLD INTERNATIONAL COMMITTED A PREDICATE ACT

In addition to the lack of specificity and particularity, the Property Owners have not alleged, and cannot allege, that Household International committed a single predicate act, much less the two minimum predicate acts required to create a "pattern" for civil RICO liability. [Appellants' Brief, pp. xviii-xxiv; R. 905-897; 890-888]. Although the Property Owners may have alleged that other Appellees committed two or more predicate acts, ***the Property Owners' claims against Household International must be judged solely on the allegations against Household International without regard to any allegations relating to other co-defendants.*** *See, e.g., McLaughlin v. Anderson,* 962 F.2d 187, 192 (2d Cir. 1992) ("the bare minimum of a RICO charge is that a defendant personally committed . . . the commission of two predicate acts."); *Banks v. Wolk,* 918 F.2d 418, 421 (3d Cir. 1990) ("We note that no defendant can be liable under RICO unless he participated in two or more predicate offenses sufficient to constitute a pattern.") *See also, Diaz v. Century Pacific Investment Corp.,* RICO Bus. Disp. Guide (CCH) ¶ 7,919 (C.D. Cal. Dec. 16, 1991); *Acebey v. Shearson Lehman Brothers, Inc.,* RICO Bus. Disp. Guide (CCH) ¶ 8,563 (C.D. Cal. June 4, 1994); *Merrill Lynch, Pierce, Fenner & Smith v. Young,* 1994 U.S. Dist. LEXIS 2929 (S.D.N.Y. Mar. 15, 1994); *Dooley v. United Technologies Corp.,* 1992 U.S. Dist. LEXIS 8653, *24 (D.D.C. June 17, 1992); and *McLoughlin v. Altman,* RICO Bus. Disp. Guide (CCH) ¶ 8,385 (S.D.N.Y. Sept. 12, 1993). The Property Owners' Second Amended Complaint, however, fails to allege the commission of

even a single predicate act by Household International. [Appellants' Brief, pp. xviii-xxiv; R. 905-897; 890-888].

The Property Owners also fail to allege, with any specificity or particularity, that anyone for whom Household International could be held accountable committed a predicate act. [Appellants' Brief, pp. xviii-xxiv; R. 905-897; 890-888]. Moreover, to the extent the Property Owners' civil RICO claims are based on alleged omissions by another company, the Property Owners fail to allege the time, place, content, and speaker for any alleged misrepresentation or misleading statement allegedly made by this other company. [Appellants' Brief, pp. xviii-xxiv; R. 905-897; 890-888].

Furthermore, the Property Owners fail to allege that Household International, or any other company, had a fiduciary duty to any person that required it to make disclosures that it allegedly failed to make. [Appellants' Brief, pp. xviii-xxiv; R. 905-897; 890-888]. Absent a fiduciary duty, a failure to disclose cannot constitute fraud. *See, e.g., Chiarella v. United States*, 445 U.S. 222, 227-28 (1980) ("At common law, misrepresentation made for the purpose of inducing reliance upon the false statement is fraudulent. But one who fails to disclose material information prior to the consummation of a transaction commits fraud only when he is under a duty to do so. And the duty to disclose arises when one party has information 'that the other [party] is entitled to know because of a fiduciary or other similar relation of trust and confidence between them.' "); *see also, Armco Indus.*, 782 F.2d at 485 (this Court notes that negative acquiescence with no duty to disclose is not fraudulent). Despite these requirements, the Property Owners never allege facts providing

any basis for inferring a duty to disclose by Household International. [Appellants' Brief, pp. xviii-xxiv; R. 905-897; 890-888]. Accordingly, the dismissal of the Property Owners' civil RICO claims should be affirmed because the Property Owners' Second Amended Complaint fails to allege a single predicate act by Household International and fails to allege that Household International had a duty to disclose to the Property Owners.

CONCLUSION

ISSUE NUMBER 1

For these reasons, Household International respectfully requests that this Court affirm the District Court's May 21, 1999 *Memorandum Opinion and Order* dismissing the Property Owners' civil RICO claims. Because the Property Owners' admit that they did not rely on the alleged fraudulent statements, and because District Courts in this circuit, as well as other Circuit courts, require detrimental reliance to prove proximate cause in a civil RICO claim based on mail and wire fraud, the District Court properly dismissed the Property Owner's claims.

ISSUE NUMBER 2

Household International also respectfully requests that this Court affirm the District Court's July 9, 1999 *Memorandum Opinion and Order* denying the Property Owners' Motion to Alter or Amend the Judgment and for Reconsideration under Rule 59(e) because the Property Owners did not raise any "new or persuasive" arguments in their motion.

CROSS-POINT

Finally, Household International also respectfully requests that, in the alternative, this Court affirm the District Court's May 21, 1999 *Memorandum Opinion and Order*, and the District Court's May 21, 1999 *Final Order of Dismissal*, dismissing the Property Owners' civil RICO claims because the Property Owners failed (1) to plead their claims with the specificity and particularity required for fraud and RICO claims and/or (2) to allege a single predicate act against Household International.

Household International also requests any other relief to which it may show itself to be justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that two (2) true and correct paper copies of the above instrument, as well as one electronic form, have been served by certified mail, return receipt requested, on counsel for all parties identified on the attached Service List, on this the 30th day of September, 1999. This document also has been sent to the Clerk of the Fifth Circuit via Fed Ex Courier on this the 30th day of September, 1999.

_____

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CERTIFICATE OF COMPLIANCE

Pursuant to 5th Cir. R. 32.2.7(c), the undersigned certifies that this Response Brief complies with the type-volume limitations of 5th Cir. R. 32.2.7(b).

1. EXCLUSIVE OF THE EXEMPTED PORTIONS IN 5th Cir. R. 32.2.7.(b)(3), THE RESPONSE BRIEF CONTAINS:

   7,667 words.

2. THE RESPONSE BRIEF HAS BEEN PREPARED:

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3. THE UNDERSIGNED UNDERSTANDS A MATERIAL MISREPRESENTATION IN COMPLETING THIS CERTIFICATE, OR CIRCUMVENTION OF THE TYPE-VOLUME LIMITS IN 5th Cir. R. 32.2.7, MAY RESULT IN THE COURT'S STRIKING THE RESPONSE BRIEF AND IMPOSING SANCTIONS AGAINST THE PERSON SIGNING THE BRIEF.

_____
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